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In the Supreme Court of the United States

OCTOBER TERM 1973

No. 73-869

OLYMPIA BREWING COMPANY,
a corporation,

Petitioner,

v.

DEPARTMENT OF REVENUE,
State of Oregon,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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TABLE OF CONTENTS

Page

PETITION

Opinions Below 1

Texts ..... A, 16, 30

Jurisdiction 2

Question Presented for Review 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Allowing the Writ 7

Conclusion 15

APPENDICES

A. Oregon Tax Court Opinion 16

B. Oregon Supreme Court Opinion 30

C. Public Law 86-272; ORS 318.020 33

D. Stipulated Facts 35

INDEX OF AUTHORITIES

Page

Cases

American Refrigerator Transit Co. v. *Tax Commission*, 238 Or. 340, 395 P.2d 127 (1964) .. 12

Heublein, Inc. v. *South Carolina Tax Commission*, 409 U.S. 275, 93 S. Ct. 483 (1972) 6, 7, 8, 9, 11, 13

Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) .. 7, 8, 11, 13, 14

Statutes

PL 86-272, 15 U.S.C.A. § 381 ..... Passim

ORS 318.020 3

Treatise

Beaman, *Paying Taxes to Other States* (1963) .. 11

Article

Berndt Lohr-Schmidt, "Jurisdictional Standards for State Taxation of Multistate Corporation Net Income," 22 Hast. L.J. 1035 (1971) 12

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DEPARTMENT OF REVENUE,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Olympia Brewing Company, a corporation, prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the state of Oregon entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Supreme Court of the state of Oregon is officially reported at 97 Or. Adv. Sh. 665 (1973), and unofficially reported at 511 P.2d 837 (1973). The full text of the opinion appears in Appendix A.

The opinion of the Oregon Tax Court is officially reported at 5 Or. Tax Ct. Adv. Sh. 99 (1972). The full text of this opinion appears in Appendix B.

JURISDICTION

The judgment of the Supreme Court of the state of Oregon sought to be reviewed is dated and was entered of record on June 28, 1973. Petitioner's petition for rehearing was denied on September 5, 1973. Petitioner's motion for stay of execution pending this petition for writ of certiorari was denied by the Oregon Tax Court on October 17, 1973.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1257 (3). Under the terms of that statutory provision petitioner claims a right, privilege or immunity under a statute of the United States, namely PL 86-272, 73 Stat. 555, 15 U.S. C.A. § 381.

QUESTION PRESENTED FOR REVIEW

Does retention of title to returnable kegs used for containerization of draft beer sold in Oregon by a state of Washington brewer nullify the immunization afforded by PL 86-272, which prohibits a state from imposing a tax on net income derived from the sale of tangible personal property where the seller's only business activities within the state consist of solicitation of orders which are sent outside the state for ap-

proval and if approved are filled by shipment or delivery from outside the state?

Expressed in broad terms, when a factor not amounting to "solicitation" within the meaning of PL 86-272 is present, what substance must such factor have before the state interest in taxing local activities will be permitted to override the national interest in promoting an open economy, thereby destroying the exemption from state income taxation otherwise provided by PL 86-272?

STATUTORY PROVISIONS INVOLVED

The state statute involved is ORS 318.020, which is set out in Appendix C.

The federal statute involved is PL 86-272, 73 Stat. 555, 15 U.S.C.A. § 381, which is set out in Appendix C.

STATEMENT OF THE CASE

This case involves imposition of a tax by the state of Oregon on net income of Olympia Brewing Company ("Olympia") from Oregon sources. Olympia, a Washington brewer, claims it is exempt from such tax by PL 86-272, which provides in relevant part that no state may impose a tax on net income derived from the sale of tangible personal property in interstate commerce where the seller's only business activities within the state consist of solicitation of orders which are sent outside the state for approval and if approved are filled by shipment or delivery from outside the

state. Olympia's only business activities in Oregon are solicitation of orders for beer by resident representatives (which orders are then approved in Washington) and shipment of beer from Washington, some of which is containerized in returnable kegs to which Olympia retains title.

In the proceedings below the facts were fully stipulated by the parties. A complete statement of the stipulated facts is contained in Appendix D. The following paragraphs are a summary of those facts.

Olympia is a corporation incorporated under the laws of the State of Washington. The home office and brewery of Olympia are located in Olympia, Washington. Olympia has no office, brewery, other operating facility, or inventory of beer in the State of Oregon.

The independent distributors in Oregon handling Olympia beer are 16 in number, each having an assigned area of primary responsibility. Sale and distribution of Olympia beer by the 16 Oregon distributors fall under two general classifications: (i) "off" sales, and (ii) "on" sales. As the terms imply, "off" sales are for consumption off the premises and "on" sales are for consumption on the premises. Of the total Olympia beer sales in Oregon, approximately 40% are "on" sales and 60% are "off" sales.

Off sales are made 90% by retail outlets (primarily grocery stores) and 10% by taverns. Draft beer sold through off sales in kegs accounts for 2% of the off sales.

On sales are made by taverns and cocktail lounges.

Of the sales, approximately 60% are draft beer (25% of total beer sales in Oregon). Draft beer is delivered in and dispensed from kegs, primarily the one-half barrel size.

Olympia representatives, residents of Oregon, varied in number from eight to fourteen during the period of January 1, 1966 through the present. Efforts of the representatives relative to off sales are directed toward effectuating display of Olympia beer at each retail outlet. Display is the means by which the ultimate consumer patronizing the retail outlet is influenced to purchase Olympia beer.

In regard to on sales, Olympia representatives contact taverns and cocktail lounges for the purpose of influencing them to switch their draft beer brand to Olympia where they have another brand, and for the purpose of encouraging retention of Olympia where Olympia is the brand already carried, and for the purpose of having them include Olympia as a brand of bottle beer carried.

Orders emanating from the activities of Olympia representatives are submitted by the retail outlets, taverns and cocktail lounges to the distributor servicing the area. No orders are accepted by the representatives. To fill the orders received from retail outlets, taverns and cocktail lounges, the Oregon distributors send orders to the brewery at Olympia, Washington. These orders, upon acceptance, are filled by shipment from Olympia to points in Oregon via common or contract carrier.

At all times, Olympia retains title to the one-half barrel size kegs and the one-quarter barrel size kegs. These filled kegs, like beer in bottles and cans, are shipped from Olympia to points in Oregon via common carrier or contract carrier pursuant to orders submitted to the brewery at Olympia, Washington by the Oregon distributors. After being emptied, the kegs are returned to the brewery at Olympia by the distributors via common or contract carriers. (End of summary of stipulated facts.)

Olympia filed a petition for a declaratory ruling with the Oregon Department of Revenue on the issue "Does PL 86-272 preclude Oregon from imposing a corporation income tax on Olympia Brewing Company?" The Department answered this question in the negative on July 23, 1971. Olympia sought review of this ruling in the Oregon Tax Court. On September 2, 1972 the Tax Court issued a decision that the activities of Olympia's representatives in Oregon amounted to "solicitation" protected by PL 86-272, but that "The presence of plaintiff's kegs in Oregon is a result of sales and not a part of solicitation under PL 86-272." (A. 28). For this reason the Revenue Department's declaratory ruling was affirmed.

Olympia then appealed to the Oregon Supreme Court, assigning as error the Tax Court's conclusion that the beer kegs subjected Olympia to the Oregon tax. While this appeal was pending the United States Supreme Court issued its decision in *Heublein, Inc.* v. *South Carolina Tax Comm.*, 409 U.S. 275, 93 S. Ct. 483 (1972), interpreting PL 86-272 as establishing

solicitation as a "lower limit" on a state's power to tax. 93 S. Ct. at 487. Olympia contended before the Oregon Supreme Court that *Heublein* confirmed Olympia's position that mere retention of title to kegs did not destroy immunity. In a decision entered on June 28, 1973, the Oregon Supreme Court affirmed the Tax Court's decision, in an opinion which made no reference to *Heublein*. A petition for re-hearing was denied on September 5, 1973.

REASONS FOR ALLOWING THE WRIT

PL 86-272 prohibits a state from imposing a net income tax on an interstate seller of tangible personal property if the only in-state business activity of the seller consists of solicitation of orders which are approved out of the state and filled by shipment from a point out of the state. A most pertinent summary of the impetus behind Congressional enactment of PL 86-272 and its primary goal is set forth in the following quotation from the recent opinion of this Court in *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275, 93 S. Ct. 483, 487 (1972) (footnotes omitted):

> "The impetus behind the enactment of § 381 [PL 86-272] was this Court's opinion in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959). There we held that 'net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to

local activities within the taxing State forming sufficient nexus to support the same.' 358 U.S. at 452, ... Congress promptly responded to the 'considerable concern and uncertainty' and the 'serious apprehension in the commercial community' generated by this decision by enacting Pub. L. No. 86-272, 73 Stat. 555, 15 U.S.C. § 381, within seven months.

"In this statute, Congress attempted to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, *Northwestern States Portland Cement* did not adequately specify what local activities were enough to create a 'sufficient nexus' for the exercise of the State's power to tax. Section 381 was designed to define clearly a lower limit for the exercise of that power. Clarity which would remove uncertainty was Congress' primary goal. By establishing such a limit, Congress did of course implicitly determine that *the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy.*" (emphasis supplied)

As made clear in the above quotation, PL 86-272 draws a line of demarcation between the state's interest in taxing business activity and the national interest in promoting an open economy.

In holding that retention of title to returnable containers nullifies PL 86-272 exemption, the instant case represents such an encroachment over and such blurring of the line of demarcation between state and

national interest that this Court should review the case to ensure attainment of the Congressional goal of bringing about clarity and removing uncertainty in an area of vital interest to an important segment of the business community. During the fourteen years following enactment of PL 86-272 in 1959, state taxing authorities and state courts have determined without intervention by this Court whether given fact situations fall on the state interest or the national interest side of the statutory line. Understandably, state tribunals have tended to resolve differences in favor of state interest.

Although *Heublein, supra,* relates the genesis and objective of PL 86-272 in concise and positive terms, the instant case demonstrates that *Heublein* will have no impact upon state court decisions. Evidently the Oregon Supreme Court ignored *Heublein* because the discussion of legislative history therein was dicta. The issue in *Heublein* was whether Congress considered difficult problems of accommodating the federal interest in an open national economy with the local interest in regulating the sale of liquor (a question which this Court answered in the negative), not whether, as here, a given fact situation within the area intended to be covered by Congress falls within the immnnity of PL 86-272.

The extent to which the Oregon court has encroached over the line between state and national interest becomes apparent upon a review of the stipulated facts. The only activities by or on behalf of Olympia in Oregon are the activities of its represen-

tatives, who varied in number from 8 to 14 during the years at issue. As held by the Tax Court (which holding was undisturbed by the Oregon Supreme Court), all activities of the Olympia representatives in Oregon come within the statutory term "solicitation of orders." Sale of beer in kegs amounted only to about *one-fourth* of Olympia's Oregon sales. Nothing in the stipulation indicates that Olympia or its representatives participated in or performed any activities relating to delivery or emptying of the kegs, and no activities connected with the kegs are attributed by the Oregon court to Olympia or the Olympia representatives.

The only difference between returnable kegs and returnable bottles is that the brewery retains title to the kegs during the round trip, while in the case of bottles title passes to the independent distributors upon delivery and then to the brewery when delivered back empty.[1] Is such difference of sufficient substance to be the determining factor as to whether the state interest in taxing business activities prevails over the national interest in promoting an open economy? Expressed in broad terms, the issue here presented is:

> When a factor not amounting to "solicitation" within the meaning of PL 86-272 is present, what substance must such factor have before the state interest in taxing local activities will be permitted

[1] Although returnable bottles have long been used in Oregon, the Department of Revenue has never suggested that such constitutes a sufficient basis for imposing a net income tax.

to override the national interest in promoting an open economy, thereby destroying the exemption from state income taxation otherwise provided by PL 86-272?

As related in the quotation from *Heublein* on page 7 above, PL 86-272 was enacted in response to *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959). The in-state activities forming the taxable nexus in both *Northwestern States* and a case consolidated with it, *T. V. Williams* v. *Stockham Valves & Fittings, Inc.*, were: (i) regular and continuous solicitation; and (ii) maintenance of a sales office in the state. Nothing in the legislative history (or this Court's review thereof in *Heublein*) indicates that Congress through enactment of PL 86-272 intended to *lower* the nexus level *below* that found sufficient in *Northwestern States Portland Cement Co.* If anything, indicia of Congressional intent point in the opposite direction.[2] Accordingly, the state interest in taxing local activities should not override the national interest in promoting an open economy unless the factor not amounting to solicitation has as much substance as maintenance of a sales office.

The quotation from *Heublein* on page 7 above suggests another barometer for determining whether a factor not constituting solicitation has enough substance to destroy immunity under PL 86-272. Opera-

[2] See S. Rep. No. 658, 86th Cong., 1st Sess., 2 U.S. Code Cong. & Admin. News 1959, p. 2549; S. Rep. No. 453, 86th Cong., 1st Sess., 11-12; H.R. Rep. No. 936, 86th Cong., 1st Sess., 1-3; also Beaman, *Paying Taxes to Other States* (1963) ch. 6, p. 11.

tion of PL 86-272 is expressed in terms of activity limits above which sufficient nexus exists and below which sufficient nexus is lacking for imposition of a state income tax. A factor at the same substantive level as solicitation (or at a lower level) should supply no more nexus than solicitation. Since PL 86-272 places solicitation below the limit of local activity required for sufficient nexus, a factor having less substance than solicitation should not preclude immunity under PL 86-272. Where neither the seller nor its representatives participate in or perform any activities relating to delivery or emptying of returnable containers, retention of title to the containers is a passive, incidental thing, contrasted with the activity required by the maintenance of a sales office or by solicitation. Obviously, something that is passive and incidental is less substantive than the affirmative acts of maintaining a sales office or soliciting. Indeed, its questionable whether passive retention of title to returnable containers even constitutes an "activity."

No authority cited by the Oregon Tax Court supports the attribution of substance to ownership of returnable containers.[3] The Oregon Supreme Court

[3] The only case cited by the Oregon Tax Court is *Amer. Refrig. Transit Co.* v. *Tax Commission*, 238 Or. 340, 395 P.2d 127 (1964). The property in question consisted of railroad refrigeration cars leased to operating railroads for use by them or their bailees at a rental of a fixed rate per mile. This property directly generated the income sought to be taxed by Oregon and is a far cry from mere ownership of containers.

As the only other authority, the Oregon Tax Court cites a law review article, Berndt Lohr-Schmidt, Jurisdictional Standards for State Taxation of Multistate Corporation Net

adopted the reasoning of the Oregon Tax Court without citation of any supplementing or additional authority.

Even if retention of title to returnable containers were not a passive factor, its integral connection with delivery should preclude destruction of the statutory exemption, since delivery which meets the conditions of PL 86-272 is also protected. In the literal as well as the figurative sense containerization is part and parcel of delivery.

Another consideration militates in favor of the conclusion that a factor not amounting to solicitation must attain the substantive level of maintaining a sales office or solicitation before it nullifies exemption under PL 86-272. In *Heublein* this Court summarized its holding in *Northwestern States Portland Cement Co.* as follows (93 S. Ct. at 487):

Income, 22 Hast. L. J. 1035 (1971). While the law review article contains the statement that ownership or use in the state of property not held purely for investment will destroy Public Law 86-272 protection, the only authority cited by the article for such statement is S. Rep. No. 658, 86 Cong., 1st Sess., 1959, U. S. Code Cong. & Admin. News 2554. The pertinent sentence in this Senate Committee Report states that the immunity provisions are not available if, for example, the out-of-state company maintains a warehouse or a stock of goods within the state. Maintaining a stock of goods or a warehouse in which the stock of goods is stored are traditional examples of sufficient nexus. Such classic nexus has no applicability to the instant situation because the stipulated facts unequivocably relate that Olympia has no office, brewery, other operating facilities, or inventory of beer in the state of Oregon. If anything, reference in the Senate Committee Report to examples of substantial property nexus tends to implicitly exclude lesser forms of property ownership as factors that will destroy the immunity of PL 86-272, particularly property ownership of such a low level as retention of title to returnable containers.

> "There we held that 'net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.' "

Solicitation plus maintenance of a sales office was the nexus approved in *Northwestern States Portland Cement Co.*, and the apportionment method was the three factor formula. As made clear in the above quotation, the income tax levy must be properly apportioned to the local activity within the taxing state forming the nexus relied upon to support the tax. But the three factor allocation formula does not follow as a matter of course.

True, if a factor having less substance than maintenance of a sales office or solicitation were deemed to be enough to destroy exemption it might be possible to tailor-make an allocation formula appropriate to the particular factor. But this problem would be eliminated, and the clarity and avoidance of uncertainty sought by PL 86-272 would better be achieved, if the factor were to have sufficient substance to support the three factor allocation formula before it is permitted to destroy exemption. In the context of this case, how does one properly apportion a state income tax imposed because title is retained to reusable containers which are connected with only 25% of the firm's in-state sales?

CONCLUSION

Regardless of whether a factor not amounting to solicitation must be substantively equivalent to maintaining a local sales office or solicitation itself or otherwise support the three factor allocation formula before the state interest in taxing local activities overrides the national interest in promoting an open economy protected by PL 86-272, it is clear from the legislative history reviewed in *Heublein* that PL 86-272 draws the line above the *de minimis* level for factors which will destroy PL 86-272 exemption when added to solicitation. There being no more attenuated basis for tax jurisdiction than retention of title to returnable containers, this case presents a most appropriate occasion for this Court to authoritatively construe PL 86-272 in the manner intended by Congress.

Respectfully submitted,

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APPENDIX A

IN THE OREGON TAX COURT

Income Tax

No. 631

OLYMPIA BREWING COMPANY,)
Plaintiff,)
v.)
DEPARTMENT OF REVENUE,)
State of Oregon,)
Defendant.)

DECISION

This case arose on a complaint for a review of a declaratory ruling of the Department of Revenue, issued pursuant to ORS 305.105, concerning the applicability of ORS chapter 318 and 15 USC § 381 (1959) (often entitled the Interstate Income Act and cited as PL 86-272). The facts relating to plaintiff's business activities in the State of Oregon were stipulated. The question before the court is whether plaintiff is subject to Oregon's corporation income tax, ORS chapter 318, beginning with the year 1966.

Olympia Brewing Company is incorporated under the laws of the State of Washington with its home office and brewery located in Olympia, Washington. Olympia has no office, brewery, other operating facility or inventory of beer in the State of Oregon.

Plaintiff contracts with 16 independent distributors in Oregon to handle Olympia beer. Each distribu-

tor has an assigned area of primary responsibility. Orders emanating from the activities of Olympia's representatives in Oregon are submitted by the retail outlets, taverns and cocktail lounges to the Oregon distributor servicing the area. No orders are accepted by the representatives. To fill the orders received from retail outlets, the Oregon distributors send orders to the brewery at Olympia, Washington. These orders, upon acceptance, are filled by shipments from Olympia to Oregon via common or contract carrier.

Sales and distribution of Olympia beer by the distributors fall under two general classifications, "off" sales and "on" sales. The former sales are made for consumption on the premises. "On" sales include sales of draft beer from kegs supplied by the plaintiff. "Off" sales are made by retail outlets such as grocery stores and by taverns, and include beer sold in kegs by taverns and by the distributors. These kegs are either one-half barrel size or one-quarter barrel size.

At all times, Olympia retains title to the kegs. When empty, the kegs are returned to the brewery at Olympia by the distributors via common carrier or contract carrer. The total number of one-half barrels shipped into Oregon by Olympia ranged from 101,310 in 1965 to 134,891 in 1969. The one-quarter barrels were not a factor until 1[illegible], when 2,926 were delivered in Oregon. The original cost of the one-half stainless steel barrel at the Olympia brewery is approximately $38; the cost of the one-quarter barrel is $32; the useful life of the barrels is estimated at ten years.

During the period of April to September, an inventory of beer for a 15-day period is normally maintained by the Oregon distributors; a 10-day inventory is maintained by most distributors for the balance of the year except during the Christmas holiday, when the inventory drops to a 5-day supply.

Applying these facts to the stipulated amount of average inventory maintained during the various seasons of the year, the Department of Revenue found that in 1969, for example, a 15-day inventory on hand would result in a daily average of 5,543 barrels having an undepreciated value in excess of $200,000. In the spring and fall of the year, when a 10-day inventory is maintained, the average value of the kegs would be in excess of $130,000 and a minimum inventory would be present around the first of each year in excess of $60,000.

The only employees of the plaintiff in this state from January 1, 1966, through the present, were 8 to 14 Oregon residents hired to promote the sales of the plaintiff's product. In the case of "off" sales through retail outlets, the efforts of the representatives are directed toward effective display of Olympia beer at each retail outlet. Since the effectiveness of total display is lost if the supply of Olympia beer on hand in the retail outlet runs short, the representatives check the supplies so that outages or potential shortages can be cured by the retailer who places orders with the distributor servicing the area.

In the case of "off" sales through taverns, Olym-

pia's representatives seek to influence the taverns to carry or to continue to carry Olympia beer for sales in bottles, cans and kegs. Where the taverns are already customers of Olympia, the representatives check the supply on hand and call outages or shortages to the attention of the tavern operator.

A primary objective of a brewery is to install its brand as the draft beer sold by as many taverns and cocktail lounges as possible. Olympia's representatives contact taverns and lounges to influence them to switch their draft beer brand for Olympia. Another duty is to encourage retention of Olympia beer where it is already carried. The same objective is sought as to the "on" sales of bottled beer.

The declaratory ruling (Income 1971-2) of the defendant concluded that the plaintiff's activities in Oregon exceeded the area of protection given by PL 86-272 and that the corporation was subject to the corporation income tax law of Oregon, beginning with the tax year 1966.

ORS chapter 318, the Corporation Income Tax Act of 1955, imposes a tax upon the net income of every corporation from sources within this state after August 3, 1955, other than income for which the corporation is subject to tax imposed by the Corporation Excise Tax Law of 1929 (ORS chapter 317) which is measured by net income. Subsection (2) of ORS 318.020 reads:

> "(2) Income from sources within this state includes income from tangible or intangible property located or having a situs in this state and in-

> come from any activities carried on in this state, regardless of whether carried on in intrastate, interstate or foreign commerce."

ORS chapter 318 incorporates by reference the provisions of ORS 314.650 et seq., relating to the apportionment of business income by the ratio of Oregon property, payroll and sales to the corporation's total property, payroll and sales.

Without the enacment of PL 86-272, there would be no doubt that the plaintiff, having property, payroll and sales in the State of Oregon, would be subject to ORS chapters 317 or 318. See *N. W. States Portland Cement Co.* v. *State of Minnesota*, 358 US 450, 79 S Ct 357, 3 L Ed 2d 421, 67 ALR2d 1292 (1959), holding that net income from the interstate operations of a foreign corporation may be subjected to state taxation, provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same.

Stimulated by the decision in *N. W. States Portland Cement Co., supra*, and *Brown-Forman Distillers Corp.* v. *Collector of Revenue*, 359 US 28, 79 S Ct 602, 3 L Ed 2d 625 (1959), the Congress enacted PL 86-272, 15 USC § 381 (1959), on September 14, 1959, which, for sellers of tangible personal property, set the threshold of taxable activity at a level not reached by itinerant solicitation or by the procurement of sales contracts by independent contractors, if the resulting shipments are made from out-of-state stocks.

See Beaman, *Paying Taxes to Other States*, ch 6 (1963).

Public Law 86-272 (Act of September 14, 1959, 73 Stat 555, codified at 15 USC § 381 (1959)), § 101, provides in pertinent part:

> "(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> "(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> "(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person can [sic] enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
>
> * * * *
>
> "(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such

person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property."

Plaintiff contends that all of its activities in Oregon come within the provisions of PL 86-272 and consequently no Oregon corporation income tax returns or payment of taxes can be required. The defendant contends that the activities of the salesmen transcend "solicitation," as that term is used in the statute, and that the maintenance of a continuing stock of beer kegs in the hands of the independent distributors and retailers in Oregon is a business activity which exceeds the protective provisions of PL 86-272.

Public Law 86-272 represents the first time in our country's history that Congress exercised its power to limit state taxation of interstate commerce. Beaman, *supra*, ch 6:3 (1963). In recommending the measure, the United States Senate Committee on Finance, in S Rep No 658, 86th Cong, 1st Sess 2548, 2551 (1959), stated:

"Your committee recognizes that the bill it has reported is not a permanent solution to the problem that exists. It was not intended to be. Your committee, like the Select Committee on Small Business of the U. S. Senate, recognizes that the problem is a complex one which requires extensive and exhaustive study in arriving at a permanent solution fair alike to the States and to the Nation. Your committee believes, however, that the

> bill it has reported will serve as an effective stopgap or temporary solution while further studies are made of the problem."

The committee's reference to "problem" encompasses a number of specifically stated problems; i.e., the taxpayers' fear of taxation from "the mere solicitation of orders" without further activity in a state; lack of uniformity of state laws; burdens of compliance, including cost; and uncertainty of the minimum activity described by "nexus." S Rep No 658, *supra*, 2549-2550.

A strict construction of PL 86-272 is proper. *Cal-Roof Wholesale* v. *Tax Com.*, 242 Or 435, 447, 410 P2d 233 (1966) aff'g 2 OTR 91 (1965), and *Herff Jones Co.* v. *Tax Com.*, 247 Or 404, 411, 430 P2d 998 (1967) aff'g 2 OTR 207 (1965), hold that a broad interpretation of the statute is not warranted. S Rep No 658, *supra*, 2553, states:

> "The immunity provided by subsection (a) of section 1 of the bill will not be available to a person, however, if the business activities by salesmen within the State on behalf of such person are not limited during the taxable year to the solicitation of such orders or of orders described in paragraph (2) of subsection (a), or both. The provisions of subsection (a) of section 1 of the bill will not be available to grant immunity to a person where the orders are filled by a shipment or delivery from a stock of goods, warehouse, plant, or factory maintained by the person within the State."

It is concluded that any business activity within the taxing state which transcends the solicitation of orders nullifies the protection of PL 86-272. *American Refrig. Transit Co.* v. *Tax Com.*, 238 Or 340, 347, 395 P2d 127 (1964).

It has been stipulated that the Olympia salesmen (a) seek to influence retailers to purchase Olympia bottled, canned and draft beer; (b) seek to influence retailers to continue to carry or to switch to the use of Olympia draft beer; (c) with the retailer's permission, seek to obtain a maximum display of Olympia advertising at each retail outlet, including prominent display of the product; and (d) regularly inspect each retailer's supplies of beer in order to call attention to the retailer of a potential shortage thereof.

It is the defendant's contention that all these activities except (a) exceed "solicitation of orders." Indeed, the defendant argues that the only activities protected by PL 86-272 are those related to filling an order blank, to be transmitted for approval to the plaintiff's office in Washington. Defendant's argument is understandable but unrealistic. In its present context, "solicitation" not only involves making an approach with a request or plea but also has the connotation "to induce," "to move to action," and is ordinarily accompanied by those devices which influence, create receptivity or claim the attention of the prospect. All the activities of plaintiff above described would come under these connotations. It can be argued that the plaintiff's total profit-making effort, in and out of the state, could be included under the broad generali-

zation of "salesmanship," and it follows that the ever-present judicial problem of determining the acceptable or negative degree presents itself. As this court has said, "There are no tests [offered by PL 86-272] to be applied and each case must be decided on its own facts." *Iron Fireman Mfg. Co.* v. *Commission*, 3 OTR 33, 39 (1967).

The court finds the salesmen's activities to be within the proper province of "solicitation of orders." They are readily distinguishable from such acts as carrying parts for sale, making collections, instructing maintenance servicemen, repairing or replacing faulty goods and answering complaints, all of which, if properly done, tend to build up goodwill and to make subsequent solicitations easier, but are consequences of prior solicitation rather than a part of or preparation for the original solicitation.

The defendant has argued that *Clairol, Incorporated* v. *Kingsley*, 109 NJ Super 22, 270 A2d 702 (1970), should be highly persuasive on this issue. That case, approved per curiam, without discussion, by the New Jersey Supreme Court, 57 NJ 199, is not completely clear. It may be distinguished and explained by the fact that PL 86-272 is applicable solely to a state's net income tax provision. New Jersey's corporation business tax act (NJSA 54:10A-1 et seq.), according to the Superior Court, cannot properly be so described, although it has some income tax elements. This court regards all the activities of Clairol's salesmen as acts of solicitation which, if performed in Ore-

gon, would constitute nexus for taxation, lacking PL 86-272. But, in the light of traditional aspects of salesmanship, usual connotations of "solicit" and the practicalities of tax administration, all of the salesmen's activities appear to this court to come within PL 86-272's "solicitation of orders."

The defendant's declaratory ruling further finds:

> "The taxpayer does hold title to property in the State of Oregon consisting primarily of beer barrel kegs, whose value according to the taxpayer, on an average monthly basis and year-end basis, consists of five thousand one-half barrel kegs having an aggregate value of $100,000 and 100 one-quarter barrel kegs having an aggregate value of $2,000. Other records available to the department indicate that at peak times of the year the monthly value of property consisting of beer kegs owned by the taxpayer in the State of Oregon is in excess of $200,000. There is in addition some minor property having a limited value, but the principal property is the aforementioned barrel kegs, the title to which is held by the taxpayer."

Is the plaintiff's regular use of the beer kegs such local "activity" or "involvement" as to constitute sufficient nexus under PL 86-272? In a carefully considered study of the subject, by Berndt Lohr-Schmidt, *Developing Jurisdictional Standards for State Taxation of Multistate Corporate Net Income*, 22 The Hastings LJ 1035 (1971), the author states, at 1041:

> "*Northwestern States* did suggest guidelines as to the various kinds of contacts with the taxing

> state which would be required to satisfy constitutional due process requirements for the valid imposition of a tax. In addition to requiring a reasonable conceptual relationship between the tax and the object or activity which is the subject of the tax, the *Northwestern States* Court spoke of taxpayers being 'sufficiently involved in *local* events' and of conducting '*substantial* income-producing activity in the taxing States' to point out respectively the *local quality* and the *substantial quantity* of income-producing activity or involvement necessary to forge the sufficient nexus."

One of the items of activity or involvement which provides nexus, discussed by the author (1043) is: ". . . the presence of an out-of-state corporation's property in the state, . . ." He compares the physical presence found in *American Refrig. Transit Co., supra,* with the lack of it noted by the United States Supreme Court in *National Bellas Hess, Inc.* v. *Department of Rev.*, 386 US 753, 87 S Ct 1389, 18 L Ed 2d 505 (1967), and the "trivial" presence in *Miller Bros. Co.* v. *Maryland,* 347 US 340, 745 S Ct 535, 98 L Ed 744 (1954). He recognizes that the entire formula of substantiality may have a different meaning for different businesses (1051). Accordingly, "solicitation" may involve the use of some personal property, such as the salesmen's samples in *Smith, Kline & French* v. *Tax Com.*, 241 Or 50, 403 P2d 375 (1965), and *State ex rel. CIBA Pharmaceutical Prods., Inc.* v. *State Tax Commission,* 382 SW2d 645 (Mo. 1964), but the meaning of "solicitation" should be limited to those generally accepted or customary

acts in the industry which lead to the placing of orders, not those which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training. Presale activities are distinguishable from similar activities that constitute services after the sale. The presence of plaintiff's kegs in Oregon is a result of sales and not a part of solicitation under PL 86-272.

Although the court recognizes that the use of the beer kegs in the delivery of beer is quite possibly an inseparable factor of the business, and that the kegs move in and out of the state with some frequency, the fact of their presence and use is fatal to plaintiff's cause, being outside the permitted activities of PL 86-272. Many businesses, by their very nature, cannot claim the benefits of the federal statute, and plaintiff's is one of them, since it appears essential to the conduct of the business to keep within the state at all times a substantial amount of personal property. That the stock is transitory does not relieve the taxpayer. *American Refrig. Transit Co., supra.* Plaintiff is engaged in an intrastate activity, after delivery of the goods, for the convenience of itself, the independent distributors and the retailers. The presence of the beer kegs has the same legal effect as if plaintiff loaned its vehicles for the local distribution of its product, obtaining its consideration as part of the price of the product.

The defendant's declaratory ruling (Income 1971-2), dated July 23, 1971, is affirmed for this reason.

The defendant is awarded costs.
Dated this 25th day of September, 1972.

/s/ *Carlisle B. Roberts*
Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

Olympia Brewing Company,

Appellant,

v.

Department of Revenue, State of Oregon,

Respondent.

* * * *

Appeal from Oregon Tax Court.

Carlisle B. Roberts, Judge.

Argued and submitted May 2, 1973.

William H. Kinsey, Portland, argued the cause for appellant. With him on the briefs were Souther, Spaulding, Kinsey, Williamson & Schwabe, Portland.

Walter J. Apley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and Theodore W. deLooze, Assistant Attorney General, Salem.

Before O'Connell, Chief Justice, McAllister, Denecke, Holman, Howell and Bryson, Justices.

PER CURIAM.

Affirmed.

FILED
SUPREME COURT
June 28, 1973

PER CURIAM.

This is an appeal by plaintiff taxpayer from a judgment of the Oregon Tax Court in favor of defendant Department of Revenue. 5 OTR 99 (1972).

Plaintiff is engaged in the business of selling beer in various states, including Oregon. The state of Oregon imposed upon plaintiff a tax under the Oregon Corporation Income Tax Law. Plaintiff contends that it is exempt under Public Law 86-272 (73 Stat 555, 15 USC § 381) on the ground that its activities in Oregon constitute nothing more than the solicitation of business.

The Department of Revenue argues that PL 86-272 is not applicable for two reasons: (1) that plaintiff was carrying on activities in Oregon consisting of something more than the solicitation of orders, such as the regular inspection of each retailer's supply of beer in order to call his attention to a potential shortage, the efforts made by sales representatives to obtain a maximum display of Olympia advertising at each retail outlet, the efforts made to influence retailers to carry or switch to the use of Olympia draft beer, etc., and (2) the fact that plaintiff maintained in Oregon personal property in the form of beer kegs which were used by retailers in dispensing Olympia draft beer.

The Tax Court rejected defendant's first ground, holding that plaintiff's activities were essentially the solicitation of business. However, the court held that plaintiff's ownership of beer kegs used in dispensing

draft beer subjected plaintiff to the Oregon tax.

We express no opinion as to whether the Tax Court was correct in finding that plaintiff's activities did not constitute the solicitation of business. We agree with the court's conclusion that the presence of plaintiff's beer kegs in Oregon for the purpose of dispensing Olympia beer was sufficient to make plaintiff subject to the Oregon Corporation Income Tax. We adopt the reasoning in that part of the Tax Court's opinion which so holds.

Affirmed.

Holman, J., did not participate in this decision.

APPENDIX C

PUBLIC LAW 86-272

CHAPTER 10B. — STATE TAXATION OF INCOME FROM INTERSTATE COMMERCE

Sec. 381. *Imposition of Net Income Tax — Minimum Standards.*

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

. . . ."

* * * *

ORS 318.020 *Imposition of tax.* (1) There hereby is imposed upon every corporation for each taxable

year a tax at the rate of eight percent upon its net income derived from sources within this state after August 3, 1955, other than income imposed by the Corporation Excise Tax Law of 1929 (ORS chapter 317) according to or measured by its net income. For tax years beginning on and after January 1, 1957, the tax rate shall be six percent.

(2) Income from sources within this state includes income from tangible or intangible property located or having a situs in this state and income from any activities carried on in this state, regardless of whether carried on in intrastate, interstate or foreign commerce.

. . . . .

APPENDIX D

STIPULATED FACTS

Olympia is a corporation incorporated under the laws of the State of Washington. The home office and brewery of Olympia are located in Olympia, Washington. Olympia has no office, brewery, other operating facility, or inventory of beer in the State of Oregon.

The independent distributors in Oregon handling Olympia beer are 16 in number, each having an assigned area of primary responsibility. Sale and distribution of Olympia beer by the 16 Oregon distributors fall under two general classifications: (i) "off" sales and (ii) "on" sales. As the terms imply, "off" sales are for consumption off the premises, and "on" sales are for consumption on the premises. Of the total Olympia beer sales in Oregon, approximately 40% are "on" sales and 60% are "off" sales.

Off sales are made 90% by retail outlets (primarily grocery stores) and 10% by taverns. Taverns, unlike cocktail lounges selling liquor as well as beer, are permitted by the Oregon liquor laws to sell beer for consumption off the premises. Of the off sales made by retail outlets, chain stores account for 60%, and other than chain stores account for the remaining 40%. Off sales include beer in kegs sold by taverns and by the distributors. These kegs are either one-half barrel size or the one-quarter barrel size. Draft beer sold through off sales in kegs accounts for 2% of the off sales.

On sales are made by taverns and cocktail lounges.

Of the on sales, approximately 60% are draft beer (25% of total beer sales in Oregon). Practically all taverns sell draft beer, all but a small percentage only one brand. Most taverns selling draft beer also sell bottled beer (91% to 92%). Practically all taverns selling bottled beer have more than one brand. About 30% of cocktail lounges sell draft beer, all but a small percentage only one brand. A very few cocktail lounges sell only draft beer and no bottled beer. With the exception of the few cocktail lounges selling only draft beer, cocktail lounges sell bottled beer, practically all of them carrying more than one brand. Draft beer is delivered in and dispensed from kegs, primarily the one-half barrel size although a few cocktail lounges and taverns with small draft beer sales use the one-quarter barrel size.

Olympia representatives, residents of Oregon, varied in number from 8 to 14 during the period January 1, 1966 through the present. Related below are the activities of the Oregon representatives grouped under headings corresponding to the sales categories outlined above.

"Off" Sales Through Retail Outlets

Efforts of the representatives are directed toward effectuating display of Olympia beer at each retail outlet. The applicable trade term is "total display." Components of total display are position, size, content, display pieces and cooler space. Total display is the means by which the ultimate consumer patronizing the retail outlet is influenced to purchase Olympia beer. Maintaining optimum total display is a con-

tinuous process. However, there are peak periods of effort during seasonal promotions. Effectiveness of total display is lost if the supply of Olympia beer on hand at the retail outlets runs short. The Olympia representatives check such supplies so that outages or potential outages can be cured by the retailer who places orders with the distributor servicing the area.

"Off" Sales Through Taverns

Olympia representatives contact taverns for the purpose of influencing the taverns to carry or continue to carry for off sales Olympia beer in bottles and cans, plus kegs. Where taverns already carry Olympia beer, the representatives check the supply on hand and call outages or potential outages to the attention of the tavern operator who places orders with the distributor servicing the area.

"On" Sales — Draft Beer

A prime objective of a brewery is to install its brand as the draft beer sold by as many taverns and cocktail lounges as possible. This is a prime objective not only because of the increased volume derived from the particular draft beer sales, but also because introduction of a consumer to draft beer through a tavern or cocktail lounge may induce the consumer to obtain the same brand when making purchases at retail outlets for off premise consumption. Olympia representatives contact taverns and cocktail lounges for the purpose of influencing them to switch their draft beer brand to Olympia where they have another brand, and for the purpose of encouraging retention of Olym-

pia where Olympia is the brand already carried. In the case of cocktail lounges and the few taverns which do not dispense draft beer, the Olympia representatives endeavor to induce the tavern or cocktail lounge to commence handling Olympia draft beer. The Olympia representatives contact new taverns and cocktail lounges in the process of starting business to promote Olympia as the draft beer which should be sold.

"On" Sales — Bottle Beer

Olympia representatives contact taverns and cocktail lounges for the purpose of having them include Olympia as the brand or as one of the brands carried. The supply of Olympia beer on hand is checked by the representatives so that outages or potential outages can be pointed out and cured through the placing of orders with the distributor servicing the area.

General

Orders emanating from the activities of Olympia representatives are submitted by the retail outlets, taverns and cocktail lounges to the distributor servicing the area. No orders are accepted by the representatives. To fill the orders received from retail outlets, taverns and cocktail lounges, the Oregon distributors send orders to the brewery at Olympia, Washington. These orders, upon acceptance, are filled by shipment from Olympia to points in Oregon via common or contract carrier. During the period of April to September, a beer inventory for a fifteen day period is normally maintained by distributors of Olympia beer in

Oregon; a ten day inventory is maintained by most distributors for the balance of the year except during the Christmas holiday, during which time the inventory drops to a five day supply.

At all times Olympia retains title to the one-half barrel size kegs and the one-quarter barrel size kegs. These filled kegs, like beer in bottles and cans, are shipped from Olympia to points in Oregon via common carrier or contract carrier pursuant to orders submitted to the brewery at Olympia, Washington by the Oregon distributors. After being emptied, the kegs are returned to the brewery at Olympia by the distributors via common carrier or contract carrier. The total one-half barrels shipped into Oregon by Olympia ranged from 101,310 in 1965 to 134,891 in 1969, with one-quarter barrels not being a factor until 1969, when a total of 2,926 were delivered in Oregon.[*] Attached hereto and marked as Exhibit "1" is a monthly statement of one-half barrels shipped to Oregon distributors as reported by Olympia to the Oregon State Liquor Commission for the years 1965 to 1969, inclusive. The original cost of the one-half stainless steel barrel at the Olympia brewery is approximately $38.00; the cost of the one-quarter barrel is $32.00. The useful life of the barrels is estimated at 10 years.

The foregoing stipulation is agreed upon between respective counsels of the parties hereto.

[* It should be noted that these figures represent annual totals. In view of the maximum fifteen-day turnover noted in the previous paragraph, the number of kegs present in Oregon at any one time is just a minor fraction of these totals.]